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No. 88-1897

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Respondents.

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED

Where the Michigan courts concluded that the proposed Michigan sobriety checkpoint program addresses an issue of legitimate public concern, that it would have some effectiveness, and that objectively it would be only minimally intrusive, is the checkpoint program facially unconstitutional in violation of U.S. Const Amend IV merely because the Michigan courts also found that it would not be as effective as other law enforcement methods and that it would have a potential for generating subjective surprise and fear in some motorists?

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ARGUMENT

I

A SOBRIETY CHECKPOINT PROGRAM WHICH IS CARRIED OUT PURSUANT TO A PLAN EMBODYING EXPLICIT NEUTRAL LIMITATIONS ON THE DISCRETION OF POLICE OFFICERS IS CONSTITUTIONAL, EVEN WITHOUT A SHOWING OF INDIVIDUALIZED SUSPICION OF EACH MOTORIST.

Respondents admit that "the Department of State Police designed its sobriety roadblock program to achieve a broader and laudatory public good", but they argue, incorrectly and inconsistently, that the checkpoints "are designed for the express purpose of assisting in the prosecution of drivers who are driving while intoxicated"; that they "are designed to address a major social problem solely through penal sanctions"; and that Petitioners "did not even attempt to justify sobriety roadblocks on the basis of the number of arrests obtained" and instead relied on a

deterrence rationale. Respondents' brief, pp 11, 13, 25. Respondents contend that despite this "broader and laudatory public good", the checkpoints do not serve any "special need" and therefore the program is unconstitutional. Petitioners assert that Respondents are incorrect on the facts, since the checkpoint program does indeed serve both law enforcement and other "special needs", and that they are wrong as a matter of law because they have fundamentally misconstrued this Court's decisions involving an analysis of "special needs."

Although the checkpoints are certainly intended to result in arrests, Respondents' argument that the sobriety checkpoint program is designed only to

assist in the prosecution of drivers is flatly contradicted by the text of the guidelines themselves (App. to Pet. for Cert. 139a-147a). Those guidelines identify drunk driving as "one of our nation's most serious public health, transportation, and safety issues" and state that the principal purpose of the checkpoint pilot program is the "reduction of alcohol-related crashes" and the concomitant traffic fatalities, personal injury and property damage. App. to Pet. for Cert. 140a, 139a. The principal goal is to:

> "Deter drunk driving, thereby reducing the death, injury, and property damage caused by alcohol- and drug-related traffic accidents." App. to Pet. for Cert. 146a.

One "integral aspect" of the checkpoint program is to "attain maximum public

awareness and voluntary compliance with OUIL [Operating Under the Influence of Liquor] laws." App. to Pet. for Cert. 145a. Another aspect of the program is to increase the public's perception and understanding of the problem of drunk driving, as shown by the fact that survey cards and informational brochures are to be distributed to drivers passing through the checkpoint. App. to Pet. for Cert. 145a-146a.

Respondents are both inconsistent and factually wrong in asserting that criminal law enforcement is the only purpose of the sobriety checkpoints, but they are also legally wrong in their arguments regarding this Court's analysis of "special needs." Respondents correctly note that this Court has

recognized that "special needs" may exist which create an exception to the Fourth Amendment's normal requirement of a warrant issued upon probable cause. Respondents incorrectly argue, however, that only "special needs" which are unrelated to law enforcement can create such an exception. This Court's decisions clearly show the fallacy of Respondents' arguments.

The "special needs" analysis was apparently first articulated by Justice Blackmun in an opinion concurring in the judgment in New Jersey v T.L.O., 469 US 325, 351-353 (1985), where the Court adopted a standard of "reasonableness" for determining the legality of searches conducted by public school officials. In reaching its decision, the Court applied a balancing test, 469 US at 337-341:

"To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.' Camara v Municipal Court, [387 US 523,] at 536-537, 18 L Ed 2d 930, 87 S Ct 1727. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

" * * * Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."

In his opinion concurring in the judgment, Justice Blackmun emphasized the importance of recognizing that such a

balancing test is an exception to the Fourth Amendment's usual requirements of a warrant and probable cause, 469 US at 351:

"I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable Cause Clause, only when we were confronted with 'a special law enforcement need for greater flexibility.' * * * Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable is a court entitled to substitute its balancing of interests for that of the Framers." (emphasis added.)

Justice Blackmun reiterated this "special needs" analysis in his dissenting opinion in Griffin v Wisconsin, 483 US 868, 881-882 (1987), where a majority of the Court held that a search of a probationer's home by state probation officers based on "reasonable

grounds," rather than a warrant and probable cause, did not violate the Fourth Amendment. In his dissenting opinion, Justice Blackmun agreed that the need for supervision in probation presents a "special need" justifying the application of a balancing test, but he felt that application of the balancing test did not necessarily create an exception to the warrant and probable cause requirements, 483 US at 881:

> "The Court, however, fails to recognize that this is a threshold determination of special law enforcement needs. * * * The presence of special law enforcement needs justifies resort to the balancing test, but it does not preordain the necessity of recognizing exceptions to the warrant and probable-cause requirements."

The text of the opinions in which the "special needs" analysis was first arti-

culated thus flatly contradicts Respondents' assertion that "special needs" must be unrelated to law enforcement.

Respondents' position is further undermined by the fact that this Court has applied a balancing test in many cases which involve criminal law enforcement, either by itself, or in conjunction with some other, non-criminal, purpose. See, for example, New Jersey v T.L.O., supra, 469 US 325 (a teacher's search of a student's purse disclosed evidence of drug dealing which was turned over to the police and later used in juvenile delinquency charges against the student); Griffin v Wisconsin, supra, 483 US 868 (warrantless search of a probationer's home by a probation officer

disclosed a firearm which was later used in a felony prosecution of the probationer); and New York v Burger, 482 US 691 (1987) (warrantless search of automobile junkyard pursuant to state administrative inspection statute disclosed stolen vehicles and parts which formed the basis of felony charges against the owner). Burger is particularly instructive since the opinion, authored by Justice Blackmun, recognizes that "special needs" may exist, and a balancing test may therefore be appropriate, in circumstances which involve administrative as well as penal goals, 482 US at 712:

> "...a State can address a major social problem both by way of administrative scheme and through penal sanctions. Administrative statutes and penal laws may have the same ultimate purpose of remedying the social problem, but they have different subsidiary purposes and

> prescribe different methods of addressing the problem."
> (emphasis in original).

Although the instant case, unlike Burger, does not involve a "closely regulated business", the Michigan sobriety checkpoints do serve both penal goals and other legitimate "special needs" of society.

Throughout the entire history of this litigation, from the time Respondents first filed their complaint and "pre-hearing memorandum" in the Michigan courts in May, 1986, Respondents, Petitioners and the state courts have all agreed that the constitutionality of the sobriety checkpoint seizures should be analyzed under a balancing test, such as that articulated in Brown v Texas, 443 US 47 (1979). The only reason Respondents

give for now attempting to abandon this balancing test is their reliance upon Skinner v Railway Labor Executives Association, 489 US ___; 103 L Ed 2d 639 (1989), and National Treasury Employees Union v Von Raab, 489 US ___; 103 L Ed 2d 685 (1989), which they cite for the proposition that "A suspicionless seizure which serves only to enforce the criminal law violates the Fourth Amendment" (Respondents' brief, page 8). Both cases include a summary of relevant Fourth Amendment principles, and both utilize the concept of "special needs", but they simply do not stand for the principle which Respondents seek to establish.

In National Treasury Employees, supra, 103 L Ed 2d at 702, this Court cites New Jersey v T.L.O., supra, 469 US

at 342, n. 8, and United States v Martinez-Fuerte, 428 US 543, 556-561 (1976), in support of the proposition that individualized suspicion is not an indispensable component of reasonableness in every circumstance. Martinez-Fuerte involved criminal prosecutions for offenses relating to the transportation of illegal aliens. Contrary to Respondents' contentions, the Court specifically said that the determination whether reasonable suspicion is a prerequisite to a valid stop is "a question to be resolved by balancing the interests at stake." 428 US at 556. The Court applied a balancing test and held that individualized suspicion was not a prerequisite to the constitutionality of the checkpoint. 428 US at 360-362. In reaching that conclusion the Court noted that, as in the

instant case, there was a substantial public interest, that the procedures minimized the intrusiveness, that the checkpoint involved a seizure rather than a search, that it did not invade the sanctity of private dwellings, and that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." 428 US at 561.

In New Jersey v T.L.O., supra, 469 US at 342, n. 8, the Court quoted from the traffic-checking decisions in Martinez-Fuerte and Delaware v Prouse, 440 US 648 (1979), and noted that individualized suspicion is not always a prerequisite to the constitutionality of a search or seizure:

> "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field"'".

Despite their contention that sobriety checkpoints are not subject to a constitutional balancing test, Respondents concede (Respondents' brief, page 14, fn. 2) that "roadside weigh stations, vehicle inspection checkpoints, and other routine regulatory inspections" are subject to a balancing test. Even though the same statute (MCL 257.715(2)) authorizes both types of checkpoints, Respondents argue that there is a distinction between them because, they contend, regulatory checkpoints--unlike the sobriety checkpoints at issue in this

case--are "not expressly designed for the enforcement of criminal laws". The distinction urged by Respondents has no support in the decisions of this Court and is simply wrong as a matter of Michigan law.

Because sobriety checkpoints are intended to serve both law enforcement purposes and other "special needs", it cannot be said that they are "expressly designed for the enforcement of criminal laws." Furthermore, even though the Michigan Motor Vehicle Code defines most violations of equipment requirements as civil infractions rather than criminal offenses, MCL 257.683(5), there are provisions of the Code which define certain violations as criminal offenses, see MCL 257.215 (driving an unregistered

vehicle is a misdemeanor). It must also be recalled that state police officers and other peace officers have authority to make arrests even while they are operating a vehicle equipment checkpoint. See MCL 28.6, 764.15.

Michigan law provides several types of sanctions which often overlap each other: criminal law provisions, civil infractions, and administrative sanctions such as the suspension and revocation of drivers' licenses.[1] Thus, the absolute dichotomy which Respondents assert between sobriety checkpoints and other "routine regulatory inspections" simply does not exist under Michigan law.

Furthermore, the artificial distinction which Respondents propose has no

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[1]In Michigan, driving under the influence of intoxicating liquor or driving with a certain percentage of

support in decisions of this Court. In

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alcohol in the blood are misdemeanors. MCL 257.625(1)-(4). A third conviction within ten years is a felony. MCL 257.625(6). Driving a vehicle while impaired by consumption of intoxicating liquor is a misdemeanor. MCL 257.625b. In addition to the criminal penalties of imprisonment, fines, and costs, the statutes require the court to order the Secretary of State to suspend the driver's license of the person for periods of up to two years or, for subsequent convictions, to order the license revoked. MCL 257.625(4), (5), (6); MCL 257.625b(2), (3), (4). Michigan also has an "implied consent" statute which provides that a person who operates a vehicle on a public highway is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol in his blood if the person is arrested for driving under the influence of intoxicating liquor or driving with a certain percentage of alcohol in the blood. MCL 257.625c. Refusal to submit to such a chemical test results in the Secretary of State suspending the person's driver's license for a period of six months. MCL 257.625f. The Michigan Liquor Control Act provides that the possession or transport by a minor of alcoholic liquor in a motor vehicle and the possession or transport by any person of alcoholic liquor in an open container within the passenger compartment of a vehicle are both misdemeanors. MCL 436.33a, 436.34a, 436.50.

Martinez-Fuerte, supra, 428 US at 560, n. 14, the Court rejected such a contention:

> "Stops for questioning, not dissimilar from those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendant's position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." (emphasis added.)

Similarly, in Delaware v Prouse, supra, 440 US at 662, the Court cited an earlier opinion and said:

> "Only last Term we pointed out that 'if the government intrudes ... the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.'"

See also, New York v Burger, supra, 482 US at 699-700 (expectation of privacy exists with respect to traditional police searches and to administrative inspections).

In summary, the dichotomy which Respondents propose is not supported as a matter of Michigan law or in this Court's decisions, and if Respondents are correct that sobriety checkpoints are unconstitutional on that basis, the constitutionality of virtually all other types of routine traffic-checking procedures is also called into question. Petitioners submit that the Fourth Amendment does not require such a draconian result.

II

IN THIS FACIAL CONSTITUTIONAL CHALLENGE, THE COURT MAY CONSIDER "LEGISLATIVE" FACTS AND ITS SCOPE OF REVIEW IS NOT LIMITED TO WHETHER THE MICHIGAN COURTS' CONCLUSIONS ARE CLEARLY ERRONEOUS.

Respondents argue that this Court should decide the facial constitutionality of this traffic-checking procedure solely on the basis of evidence and testimony adduced at a state court evidentiary hearing and should limit its review to whether the factual findings of the state trial court are clearly erroneous. As argued in our principal brief, Petitioners contend that the evidence and testimony at the state court hearing is sufficient to sustain the constitutionality of the sobriety checkpoints and that the state courts applied an improper legal standard and burden of

proof by requiring the State to prove, in advance and by conclusive empirical evidence, that sobriety checkpoints are the most effective procedure to combat drunk driving. We contend that under the appropriate balancing test, see Brown v Texas, supra, 443 US at 50-51, the sobriety checkpoints are a reasonable and constitutional seizure since there is an undisputed severe public concern, the checkpoints reasonably advance the public interest, and the severity of the interference with individual liberty is minimal. With particular respect to the question of the effectiveness of this procedure, the undisputed evidence at the state court hearing demonstrates an arrest rate of more than 1% of the vehicles passing through the checkpoint (two arrests out of 127 vehicles) and

demonstrates that the checkpoints would have at least a short-term deterrent effect.

Several of the amicus curiae briefs in the instant case refer to statistical information and studies which were not introduced into evidence at the state court hearing and Respondents contend that this Court should not consider the material. Petitioners submit that the material consists only of "legislative"

facts rather than "adjudicative" facts[2] and is therefore available for this Court's consideration. In the original "Brandeis brief" in Muller v Oregon, 208 US 412 (1908), extra-record information was presented to the Court, not to show that it was necessarily true, but to show

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[2]One commentator has defined the difference as follows:

> "The paradigm of an adjudicative fact is a description of a past, individual physical or mental phenomenon, the proof of which is in the record. *** A paradigmatic legislative fact is one that shows the general effect a legal rule will have, and is presented to encourage the decisionmaker to make a particular legal rule. There is less a sense that legislative facts are true or knowable because such facts are predictions, and, moreover, typically predictions about the relative importance of one factor in causing a complex phenomenon."

Woolhandler, Rethinking the Judicial Reception of Legislative Facts, 41 Vand. L. Rev. 111, 113-114 (1988) (fn. omitted)

that the information existed and that rational legislators could rely on it. See, Miller and Barron, The Supreme Court, The Adversary System and the Flow of Information to the Justices: A Preliminary Inquiry, 61 Va. L. Rev. 1187, 1234-1235, n. 121 (1975).

So, too, in the instant case. "Legislative" facts are properly available for the Court's consideration in this facial constitutional challenge, not so much to show that they are right and the state court is wrong, but at least to show that there is evidence of the effectiveness of sobriety checkpoints which supports the rationality of the state officials' decision to operate such checkpoints. It is against this evidentiary backdrop that this Court must

decide the legal question of whether the sobriety checkpoint procedure is reasonable and thus facially constitutional.

The adverse consequences of prohibiting courts from considering "legislative" facts and limiting their review only to "adjudicative" facts which have been formally introduced as evidence are widely recognized. A well-known treatise gives an example of the difficulties which would occur under such a rule, Cleary, McCormick on Evidence, (3rd Ed., 1984, 1987 pocket part) § 334, p. 127:

> "A problem would then arise if a trial court had to decide the question of law whether it was constitutional totally to exclude from a bifurcated jury in a capital case persons opposed to the death penalty. After hearing testimony and accepting documentary material, the court might conclude on the basis of the available social science materials that either the death

> disqualification produced conviction prone juries or it did not. The court might bottom its decision of the constitutional issue on this 'finding of fact.' If the social science materials were not clearly inclined to sustain only one conclusion, and the ruling were treated as a factual finding, the ruling whichever way it came out could not be reversed because it would not be clearly erroneous. Law would come to turn on fact and be susceptible to two right answers. Clearly legislative facts are not 'evidence' in the normal sense of the word, and the traditional doctrine of judicial notice still obtains as to them."

This Court has indicated that it is "far from persuaded" that a "clearly erroneous" standard of review applies to "legislative" facts. Lockhart v McCree, 476 US 162, 168-169, n. 3 (1986). Additionally, in many cases the Court has based its decision, at least in part, on consideration of social, economic, political, or scientific data which was not contained within the lower court's

evidentiary record. Among the many examples are Brown v Board of Education, 347 US 483 (1954) (invalidating the concept of "separate but equal" segregated schools); Roe v Wade, 410 US 113 (1973) (where the Court examined historical, social, and medical data in reaching a decision on the constitutional principles governing regulation of abortions); Schmerber v California, 384 US 757 (1966) (evaluating the effectiveness and intrusiveness of blood tests); and Pennsylvania v Mimms, 434 US 106 (1977) (the Court relied on a non-record study of injuries to police officers).

Respondents cite Delaware v Prouse, supra, 440 US 648, and United States v Martinez-Fuerte, supra, 428 US 543, as instances where the Court's "exclusive

focus" was "solely" on the actual evidentiary record presented at trial. Respondents' brief, page 19. Examination of those decisions, however, does not reveal such an absolute position. As we argued in our principal brief, Petitioners' brief, pages 59-60, the Court in Martinez-Fuerte, 428 US at 557, did not cite any evidence in the record when it recognized a deterrent effect to the checkpoint procedures and when it recognized that smugglers were known to use certain highways regularly. Similarly in Delaware v Prouse, 440 US at 658-659, although the Court found that discretionary random seizures were not a sufficiently productive mechanism on the record before it, the Court also appeared to consider other non-record materials. For example, the Court cited to a highway

safety report prepared by the United States Department of Transportation when it said, 440 US 658:

> "Although the record discloses no statistics concerning the extent of the problem of lack of highway safety, in Delaware or in the Nation as a whole, we are aware of the danger to life and property posed by vehicular traffic and of the difficulties that even a cautious and experienced driver may encounter."

Later in the opinion, 440 US at 659, the Court observed that drivers without licenses are "presumably" less safe than other drivers and absent some empirical data to the contrary "it must be assumed" that unlicensed drivers were more likely to be found among drivers who commit traffic violations.

In the instant case it cannot be disputed that Respondents instituted this

litigation as a facial challenge to the constitutionality of Michigan's sobriety checkpoint procedure, particularly when it is recalled that Respondents' complaint was filed before any such checkpoint had been operated in Michigan. The complaint requested injunctive and declaratory relief and although some evidence and testimony was introduced at a hearing in the state court, Petitioners submit that the fundamental question is a legal one: the reasonableness of Michigan's proposed sobriety checkpoint program. Despite the fact that Respondents produced testimony by a witness whose opinion was that sobriety checkpoints would not be effective in the long run, and despite the fact that the trial court "found" that sobriety checkpoints were not effective, the facial

constitutionality of the proposed checkpoints is not insulated from this Court's review. This Court is free to consider "legislative" facts and apply the appropriate balancing test in determining the constitutional "reasonableness" of the sobriety checkpoint program.

III

THE MICHIGAN SOBRIETY CHECKPOINT PROCEDURES ARE FACIALLY CONSTITUTIONAL SINCE THEY ARE REASONABLY EFFECTIVE IN ADDRESSING A SERIOUS SOCIAL PROBLEM AND THEY ARE MINIMALLY INTRUSIVE.

Respondents' brief contains several additional mischaracterizations which require response. For example, Respondents incorrectly assert that Petitioners "conceded" that the sobriety checkpoints could not be deemed effective on the basis of the number of arrests which resulted and they assert that we have "completely reversed" our position on this point. Respondents' brief, pages 25, 27-28, fn. 9. Both the guidelines themselves (see App. to Pet. for Cert. 141a) and the testimony at the state court hearing (see Testimony of Col. Hough at App. 77a and testimony of

Inspector Fladseth at Tr., Vol. III, p 27) indicate that it was not anticipated that the checkpoints would result in high numbers of arrests. Respondents grossly misstate the situation, however, when they assert that Petitioners "conceded" that the arrest rates demonstrate that sobriety checkpoints are ineffective. Deterrence and public information are the primary goals of the sobriety checkpoint program, but the program is also clearly designed to apprehend any drunk drivers who pass through the checkpoint.

The undisputed evidence at trial indicates that two arrests for drunk driving were made out of 127 vehicles which passed through the checkpoint. This, without more, is sufficient to

demonstrate the effectiveness of the program. In addition to the actual arrests made during the single checkpoint which operated in Michigan, the undisputed evidence at trial indicates that the arrest rate at checkpoints throughout the country result in an arrest rate which approximates 1%. Petitioners submit that this, too, is sufficient to demonstrate the effectiveness of the program. Furthermore, evidence on the deterrent effect of sobriety checkpoints demonstrates their effectiveness. As pointed out in our principal brief, Petitioners' brief, page 47, even Respondents' own expert witness, Dr. Ross, testified that sobriety checkpoints do in fact have short-term deterrent effect.

Three county sheriffs testified at the hearing, but the most that may be said of their testimony is that based on their current practices and their understanding of the procedures for the proposed checkpoints, they believed that their current procedures were more effective (Tr., Vol. I, pp. 147, 164, 179-180), but that if the checkpoint program was shown to be an effective deterrent, they would utilize such a program (Tr., Vol. I, pp. 150-151, 175, 182). Contrary to Respondents' assertions at pages 42-43 of their brief, the sheriffs did not testify that sobriety checkpoints undermine law enforcement efforts to combat drunk driving.

At page 27, fn. 8 of their brief, Respondents argue that if the media

coverage of sobriety checkpoints diminishes over time, the effectiveness of the checkpoints would be diminished, but that argument is not supported in the evidentiary record. To the contrary, Lt. Cotton testified that if there is a great deal of publicity the arrest rate might be low but the deterrent effect would be greater and, conversely, if there was little media coverage, the arrest rate would increase. Tr., Vol. II, pp. 36-42.

Respondents acknowledge that the procedures of the sobriety checkpoint result in a limitation on the discretion of police officers in the field in determining which cars to stop, but they argue (Respondents' brief, pp. 32-34) that there is a potential for unconstitu-

tionally intrusive behavio by police officers after a car has been stopped at the checkpoint. That argument is misguided, however, because only the initial seizure itself is at issue in this facial constitutional challenge. If, after a car has been constitutionally seized at a checkpoint, there is further, more intrusive police conduct, other constitutional principles may come into play. Martinez-Fuerte, supra, 428 US at 555, recognized that different traffic-checking practices involve different balances of public and private interests, in Railway Labor Executives, supra, 103 L Ed 2d at 659, the Court observed that the Fourth Amendment "may be relevant at several levels," and in Pennsylvania v Mimms, 434 US 106, 109 (1977), the Court's analysis differentiated between an initial traffic

stop, a request to the driver to get out of the car, and a subsequent frisk.

This Court's decisions have routinely applied Fourth Amendment principles in a variety of automobile contexts. For example, in Martinez-Fuerte, supra, 428 US 543, the Court held that a seizure of an automobile at a fixed checkpoint, and the selective referral of some motorists to a secondary inspection area for brief inquiry, was permissible without any individualized suspicion, but in United States v Ortiz, 422 US 891 (1975), the Court held that a search at such a checkpoint requires a showing of probable cause. Ortiz recognized, however, that the line between a search and a seizure for inspection may not always be clear. 422 US at 897, n. 3, 894, n. 1. Texas v

Brown, 460 US 730 (1983), holds that the police may station themselves in a position to get a better view of an automobile's interior and may shine a flashlight into the interior and seize items in "plain view." In Pennsylvania v Mimms, 434 US 106 (1977), the Court held that a police officer may compel the driver to get out of the car after a valid stop and, if there was reasonable suspicion under the standard of Terry v Ohio, 392 US 1 (1968), the officer could frisk the driver. Pursuant to Michigan v Long, 463 US 1032 (1983), if a police officer possesses a reasonable belief based on articulable facts that a suspect is dangerous and may gain control of weapons, the officer may search those areas in the passenger compartment of the automobile in which a weapon may be

placed or hidden. These types of assessments do not lend themselves to "hard certainties"; rather they involve "probabilities" and "common-sense conclusions about human behavior" from which "a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained person." United States v Cortez, 449 US 411, 418 (1981).

Any number of hypothetical situations can be imagined, but the Court need not reach such issues in determining the validity of the initial seizure at a sobriety checkpoint. Furthermore, if the constitutionality of checkpoints is upheld and a motorist contends that particular police conduct as to him or her is unconstitutional, such a challenge is

readily available in a post-stop judicial review. Martinez-Fuerte, supra, 428 US at 559.

SUMMARY AND RELIEF SOUGHT

Because of law enforcement needs and other "special needs" such as deterrence, public education of the danger of drunk driving, and public safety, the facial constitutionality of Michigan's sobriety checkpoint procedure should be evaluated under a balancing test which weighs both the public and private interests. Under such a balancing test, the sobriety checkpoint procedure is reasonably effective in combatting a serious public problem and is minimally intrusive. That conclusion is apparent from the record of the case and is even more apparent when

other appropriate "legislative" facts are considered. Under all of the circumstances, the sobriety checkpoint program is reasonable and constitutional.

WHEREFORE, Petitioners ask this Court to reverse the judgment of the Michigan courts and declare the Michigan sobriety checkpoint program constitutional on its face.

Respectfully submitted,

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